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Supreme Court, U.S.
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No. 04-899

IN THE

Supreme Court of the United States

ATTICA CENTRAL SCHOOLS,

Petitioner,

v.

J.S. [HEREINAFTER "JOHN"], BY HIS PARENT AND NATURAL GUARDIAN, N.S.; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; S.H. AND C.H. [HEREINAFTER "SALLY" AND "CHARLES"], BY THEIR PARENT AND NATURAL GUARDIAN, J.H., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; C.Z. AND K.Z. [HEREINAFTER "CAROLINE" AND "KEN"], BY THEIR PARENT AND NATURAL GUARDIAN, K.Z., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; D.E., [HEREINAFTER "DENNIS"] BY HIS PARENT AND NATURAL GUARDIAN, S.E., ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the futility exception to the IDEA's exhaustion requirement apply to the complaint in this case alleging systemic violations of the IDEA by a school district which cannot be addressed through the administrative process?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated October 6, 2004, for which a writ of certiorari is being sought, is reported as *J.S. v. Attica Central Schools*, 386 F.3d 107, 2004 WL 2244235 (2d Cir. 2004).[1] That opinion affirmed the decision of the United States District Court for the Western District of New York, dated September 30, 2001, and entered October 1, 2001.[2] Defendant's motion to stay the mandate of the Second Circuit, dated October 26, 2004, was denied by the Second Circuit on November 10, 2004. Thereafter defendant filed an application for a stay with Justice Ruth Bader Ginsburg which was denied on December 15, 2004.

STATEMENT OF THE CASE

Prior to the commencement of the instant action, Respondents' counsel was contacted by the parents of the six named plaintiffs, all of whom were school children with disabilities residing in the Attica Central School District. Some of the issues discussed were unique and individualized to particular children, while others reflected systemic violations of the IDEA and Section 504, thus impacting on all such children residing in the school district.

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1. Attached as Appendix "A" to the Petition For A Writ Of Certiorari (hereinafter "Petition"). None of the other opinions or orders in this case have been reported. *See* Petition, p. 1 and its Appendices "A" through "E."

2. Attached as Appendix "E" to the Petition.

Administrative hearings were requested on behalf of two of the named Respondents related to *individual* issues which could be addressed through the administrative process, and these issues were successfully resolved. Thereafter, on June 14, 2000, Respondents commenced the instant action related to widespread and systemic violations of the IDEA and Section 504 which cannot be addressed or resolved through the administrative process.[3] Respondents did so in reliance upon the longstanding precedent of this Court, as well as the precedent and practice of the Second Circuit (and the other circuit courts) which recognize a "futility" exception to the exhaustion requirement.

Petitioner, Attica Central Schools, filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) with the Western District of New York on August 15, 2000. This motion sought dismissal of the complaint on the ground of lack of subject matter jurisdiction for failure to exhaust administrative remedies.[4]

On September 30, 2001, the Western District of New York denied Attica's motion.[5] The district court, following the applicable standard of review (1) accepted the allegations in the complaint as true, (2) determined that the allegations

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3. A copy of the complaint is attached hereto as Respondents' Appendix "A." At the request of the district court (preferring that there not be a three year old motion pending), on February 11, 2003 Respondents' motion to certify the class was ordered withdrawn without prejudice and with leave to re-file *nunc pro tunc.*

4. Petitioner also moved to dismiss under Federal Rule 12(b)(6) related to the sufficiency of the section 504 and 1983 claims.

5. Petition, Appendix "E."

involved systemic violations by the school district which could not be addressed or remedied through the administrative process, and (3) followed the precedent and practice of the Second Circuit recognizing a "futility" exception to the exhaustion of administrative remedies in lawsuits alleging *systemic* violations of the IDEA.[6]

On October 6, 2004, the Second Circuit affirmed the lower court's denial of Petitioner's motion to dismiss. The Second Circuit recognized that "the complaint does not challenge the content of Individualized Education Programs, but rather the School District's total failure to prepare and implement Individualized Education Programs."[7] It also noted that the complaint alleged "twenty-seven separate ways in which [Petitioner] failed to comply with its obligations to its students who are or may be disabled, and to those students' parents."[8] Consequently, following its own precedent, the Second Circuit applied the "futility" exception to the exhaustion requirement in the instant case, where such violations could not be addressed through the administrative process.[9]

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6. The district court refused to consider Petitioner 's motion as one for summary judgment and would not rely on materials outside of the pleadings, since Respondents had no opportunity to conduct discovery. Petition, Appendix "E", p. 34a.

7. Petition, Appendix "A," p. 13a.

8. Petition, Appendix "A," p. 6a.

9. Both the circuit court and the district court referenced specific examples of *systemic* violations which could not be addressed through the administrative process. *See* Petition, Appendix "A," p. 13a; Petition, Appendix "E," p. 38a; and related allegations in the complaint, Respondents' Appendix "A," attached hereto.

SUMMARY OF ARGUMENT

The issues presented do not raise considerations appropriate for review by writ of certiorari, pursuant to Supreme Court Rule 10, which may be granted "only for compelling reasons." In particular, the jurisdictional issue was decided several years ago when this Court recognized a "futility" exception to the exhaustion of the IDEA's [formerly the "EHA"] administrative process. *Honig v. Doe*, 484 U.S. 305, 326-27 (1988).

This exception to the general rule (otherwise requiring exhaustion) readily applies when a case does not involve the typical challenge by parents to their child's *Individualized* Education Program ("IEP") but rather involves a pattern and practice of systemic violations which the IDEA's administrative remedies are not designed, nor intended, to address. As a result, the Second Circuit, and *every other circuit* court that has addressed this issue, has consistently held that in such cases, exhaustion of administrative remedies is not required since to do so would be "futile."

No court (circuit court or district court) has ever espoused or adopted the mechanical, "one size fits all" rule proposed by the Petitioner, which would restrict application of the futility exception to the IDEA's exhaustion requirement to cases where the defendant is a *state* rather than a *local school district*. Hence, there is no conflict or important federal question warranting this Court's exercise of its supervisory power in this case.

REASONS FOR DENYING THE PETITION

I. The Jurisdictional Issue Has Already Been Determined By This Court

Several years ago, this Court recognized a "futility" exception to the exhaustion of the IDEA's [formerly the "EHA"] administrative process. *Honig v. Doe*, 484 U.S. 305, 326-27 (1988). Nevertheless, Petitioner makes only passing reference to *Honig* (in a footnote) and erroneously asserts that the Court "has never defined the scope of possible exceptions."[10] On the contrary, this Court, citing *Smith v. Robinson*,[11] and Congressional intent underlying the IDEA, held that "parents may bypass the administrative process **where exhaustion would be futile or inadequate.**"[12]

Notwithstanding Petitioner's attempts to characterize the exhaustion requirement as hinging on the identity of the defendant in a given case, *Honig* never referenced this artificial "rule." Rather, the longstanding rationale for the exception to the exhaustion requirement is *futility.* As noted by the district court below:

> Senator Harrison Williams, author and floor manager of the Senate bill stated that "exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing action in cases where such

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10. Petition, p. 12, n.9.

11. 468 U.S. 992, 1014 n.17, 104 S. Ct. 3457, 3469 (1982).

12. 484 U.S. at 327 (emphasis added).

exhaustion would be futile either as a legal or practical matter."[13]

II. The Purpose For Exhausting Administrative Remedies Does Not Apply When Systemic, Widespread IDEA Violations Are Alleged

Recognizing the need for judicial economy and the desirability that persons with expertise first address "technical" issues, the courts generally require exhaustion of administrative remedies before commencing judicial action. *McKart v. United States*, 395 U.S. 185, 194-95 (1969). However, "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." 395 U.S. at 193.

The IDEA is premised on the extensive involvement of a multi-disciplinary team which makes substantive educational determinations related to an individual child's ***Individualized*** Educational Program ("IEP"). This IEP is the "centerpiece of the statute's education delivery system." *Honig*, 484 U.S. at 311. Consequently, when a school district commits widespread and systemic violations of the IDEA, as alleged in the instant case, which do not involve substantive educational decisions regarding an individual child's IEP, exhaustion of the administrative process is "futile."

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13. Petition, Appendix "E," p. 36a. See also the legislative history related to the Handicapped Children's Protection Act (HCPA) referenced in Section IV, note 28, below, which recognizes application of the futility exception to claims under section 504 and other federal statutes.

Contrary to Petitioner's proposed rule creating an irrebuttable presumption that exhaustion should always be required where the party defendant is a school district rather than the state, this Court has never defined exhaustion based on the application of mechanical factors. *Honig* at 326-27. Rather, where the policies and purposes underlying the exhaustion requirement are not served, e.g., where, as in the instant case, there is no purpose to be served by the compilation of a detailed factual record, or from agency expertise, this Court recognizes exceptions to the exhaustion requirement. *McKart* at 194, 197.

Indeed the issue of whether administrative remedies must be exhausted in class action lawsuits has been adjudicated in a variety of contexts. Yet this Court has never resolved the question on the basis of the identity of the defendant in place of a thorough analysis of the facts and issues presented in the specific case. In particular, this Court has explained that "application of the exhaustion doctrine is 'intensely practical'." *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (citation omitted). In applying this test of practicality, "[t]he ultimate decision of whether to waive exhaustion should not be made solely by mechanical application of . . . factors, but should also be guided by the policies underlying the exhaustion requirement." *Id.*[14]

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14. *Bowen*, a class action challenging Social Security Disability benefits, addressed two issues. The first (non-jurisdictional question) dealt with an equitable tolling of a statute of limitations. The second issue involved a non-waivable jurisdictional exhaustion requirement. As to the latter, this Court held that the policies underlying exhaustion excused the need for exhaustion based on an analysis of the facts and issues presented in that case.

III. There Is No Circuit Split On The Question Presented

No decision by any circuit court of appeals is in conflict with the Second Circuit's decision in this case and related precedent. For example, the Third Circuit Court of Appeals, citing the precedent of the Second Circuit, remanded an IDEA case to determine application of the futility exception where the plaintiffs alleged systemic legal deficiencies and requested system-wide relief that could not be provided, or even addressed, through the administrative process. *Beth V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996). Likewise, the Tenth Circuit has held that "[a]dministrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek system-wide reforms." *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993). In addition, the same circuit held that exhaustion of the administrative process was not required in a class action lawsuit (under section 504 of the Rehabilitation Act) where there was no provision for systemic claims to be presented at the administrative level. *New Mexico Association for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 851 (10th Cir. 1982).

Petitioner's assertion that:

> [t]he Ninth and Second Circuits have announced a different rule: that while there may be an exception to the exhaustion requirement where allegations of "systemic" violations are made against a state, there is no such exception when allegations of "systemic" violations are lodged against a local school district[15]

is without basis or support. Primarily, Petitioner relies on the Ninth Circuit decision in *Hoeft v. Tucson Unified School District*,

15. Petition, p. 13. Petitioner likewise mischaracterizes the holdings of the Ninth and Second Circuit in its Petition at pages 9-10.

967 F.2d 1298 (9th Cir. 1992) in support of its proposed new rule. However, unlike the instant case, the Ninth Circuit was specifically addressing a challenge to a single policy (extended school year services) which could be addressed through the administrative process via an individual hearing. *Hoeft* was expressly *not* addressing the "futility" exception. Rather it was focused on an entirely different exception, to wit, challenges to generally applicable policies that are "contrary to the law." 967 F.2d at 1305. The court specifically noted that **"[t]he plaintiffs do not contend on appeal that exhaustion would be futile. We therefore do not consider whether this case falls within the 'futility' exception to the IDEA's exhaustion requirement**." 967 F.2d 1298, 1304 n.5 (emphasis added).

Although it was not addressing the issues presented in the instant case, *Hoeft* did recognize the validity of the "futility" exception in those cases where resort to the administrative process would be futile or inadequate, 967 F.2d at 1303, citing with approval the decisions of the Second Circuit. 967 F.2d at 1304-1305, 1309. The Ninth Circuit understood the significant distinction between its case and the Second Circuit decisions involving "futility," explaining that "[p]laintiffs' complaint, on the other hand, focuses on the shortcomings of a particular component of Tucson Unified's special education program - extended year services. The alleged violations do not rise to a truly systemic level in the sense that the IDEA's basic goals are threatened on a system-wide basis." 967 F.2d at 1305.[16]

16. In a subsequent decision, the Ninth Circuit reiterated that its decision in *Hoeft* was premised on the fact that the plaintiffs did *not* raise "systemic" issues. *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678, 681. This decision involved a claim of neglect of juvenile

(Cont'd)

Likewise, Petitioner's proclamation that the Second Circuit has adopted a rule precluding application of the futility exception where systemic violations are asserted against a *local school district* is erroneous. Petitioner's underlying analysis, premised on a purported internal conflict within the Second Circuit itself (as distinguished from a split among the circuits) is fallacious. Specifically, Petitioner proposes that when the Second Circuit affirmed the district court's decision in *Hope v. Cortines*,[17] it thereby "announced" a new rule, and thereafter, when the Second Circuit decided the instant case, its doing so created an internal conflict which "[u]nfortunately, the Circuit Court's decision failed to resolve. . . ."[18]

The Second Circuit's *unanimous* decision in the instant case refutes this premise. Although Petitioner had extensively briefed, argued and implored the Second Circuit to endorse Petitioner's unique interpretation of *Hope*, the Court disagreed, and responded as follows:

> We acknowledge *Hope's* recognition of the importance of exhaustion in "textbook" cases

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(Cont'd)

inmates at a facility typically housed only by adults. Once alerted to such oversight, the defendant took steps to remedy the problem. *Id.* at 682. In any event, the Ninth Circuit again cited with approval the precedent of the Second Circuit as well as this Court's decision in *Honig*. 111 F.3d at 682.

17. 872 F. Supp. 14, *aff'd*, 69 F.3d 687 (2d Cir. 1995). The Second Circuit affirmed on the opinion of the district court alone (and issued no further opinion).

18. Petition, p. 13.

> presenting issues involving individual children where the remedy is best left to educational experts operating within the framework of the local and state review procedures. However, the complaint in this case does not allow us to conclude that this is such a "textbook" case - at least not at this stage of the proceedings.[19]

Accordingly, the Second Circuit gave short shrift to Petitioner's radical new *Hope* rule, holding instead that the "futility" exception did apply in this case, and that the district court did have subject matter jurisdiction, notwithstanding that Petitioner is a *local school district*. The Second Circuit's reluctance to adopt the "inflexible"[20] rule proposed by the

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19. Petition, Appendix "A," p. 13a. Note that the Second Circuit, in an earlier decision also explained *Hope* in the same fashion. *Polera v. Board of Education*, 288 F.3d 478, 484 (2d Cir. 2002). Indeed, Respondents are aware of no decision (and Petitioner has never cited a decision) in which any court has cited *Hope* for Petitioner's proposed new "rule" restricting or eliminating the futility exception to the exhaustion requirement. Rather, *Hope* is cited generally for such propositions as (1) in the typical IDEA case where a parent is challenging the educational program of his/her child, exhaustion is required. *Murphy v. Arlington Central School District Board of Education*, 297 F.3d 195, 197, 199 (2d Cir. 2002); and (2) the exhaustion requirement applies where other federal statutes are asserted, but the relief sought is also available under the IDEA. *Polera*, 288 F.3d. at 487; *Hoekstra v. Indep. Sch. Dist. No. 283*, 916 F. Supp 941 (D. Minn. 1996), *aff'd*, 103 F.3d 624 (8th Cir. 1996), *cert. denied*, 520 U.S. 1244 (1997).

20. The reluctance of the Second Circuit to adopt the "inflexible" rule proposed by the Petitioner is mirrored in several of that court's decisions holding that the exhaustion requirement is "not inflexible." *Taylor v. Vermont Department of Education*, 313 F.3d. 768, 789-90 (2d Cir. 2002); *Murphy*, 297 F.3d 195, 199; *Weixel v. Board of Education*, 287 F.3d 138, 149 (2d Cir. 2002); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir. 1987).

Petitioner (tied to the identity of the party defendant) is consistent with this Court's reluctance to rely on mechanical factors rather than the policies underlying the exhaustion requirement. *Bowen v. City of New York*, *supra*, 476 U.S. at 484.

In short, it is the Petitioner which has "announced" a new "rule" - not the Second Circuit. This "rule" is invented out of whole cloth and makes no sense. The Petitioner advocates for the useless expenditure of resources notwithstanding the district court's findings (upheld by the circuit court) that the allegations alleged in this case involved systemic violations which could not be addressed or remedied through the administrative process.[21] Neither the district court nor the Second Circuit even deemed Petitioner's "rule" worthy of comment.[22] Likewise, it is the Petitioner which has announced a nonexistent split or conflict among the circuits. In actuality, the only conflict is between this Petitioner's unique interpretation of the law and the precedent of the Second Circuit and all the other circuits to the contrary.

IV. There Is No Basis To Review The Determination Of The Sufficiency Of The Section 504 Claims

The Second Circuit held that the district court applied the correct standard in its consideration of Petitioner's motion to dismiss the section 504 counts.[23] The district court had recognized that Respondents' first section 504 claim, related

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21. *See* note 9, above.

22. Petition, Appendix "A" and "E."

23. Petition, Appendix "A," p. 16a. The Second Circuit's ruling also applied to Petitioner's motion to dismiss the section 1983 count (which, however, Petitioner has not raised in its Petition).

to "physical accessibility" of the school district's facilities, did not seek "relief that is also available" under the IDEA and was not subject to the exhaustion requirement in 20 U.S.C. § 1415(l).[24] It also found that Respondents had sufficiently pleaded a claim for relief and that Petitioner did not contest any of the requisite elements.[25]

In addition, the lower court determined that Respondents' second section 504 claim, alleging systemic violations of their right to a Free Appropriate Public Education, raises claims coextensive to the IDEA.[26] As such, the Second Circuit upheld the district court's determination that this claim is subject to the futility exception to the exhaustion requirement.[27] Indeed, the legislative history behind the Handicapped Children's Protection Act of 1986 (HCPA), P.L. 99-372, 100 Stat. 796 (now codified at 20 U.S.C. § 1415(l)) explicitly recognized the existence of exceptions to the exhaustion requirement related to claims under section 504 and other federal statutes. In particular, "futility" was singled out as an example of when exhaustion would not be required.[28] Accordingly, no substantial federal question is raised by the circuit court's affirmance of these determinations.

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24. Petition, Appendix "E," pp. 35a-36a (n.4).

25. Petition, Appendix "E," p. 41a.

26. Petition, Appendix "E," pp. 35a-36a.

27. Petition, Appendix "A," pp. 15a-16a.

28. "Exhaustion of EHA administrative remedies would thus be excused where they would not be required to be exhausted under the EHA, **such as** when resort to those proceedings would be **futile**." Sen. Rep. No. 99-112, p. 15. 1986 U.S. Code Cong. & Admin. News 1805 (emphasis added).

The district court also found that Respondents' second section 504 claim, related to systemic violations of their right to a Free Appropriate Public Education, supports an inference of bad faith or gross misjudgment sufficient to survive Petitioner's motion to dismiss.[29] This finding, as upheld by the Second Circuit, also does not raise a substantial federal question.[30] Consequently, the Second Circuit's determination of the sufficiency of Respondents' section 504 claims does not raise any important federal question or otherwise call for exercise of this Court's supervisory power.

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29. Petition, Appendix "E," pp. 41a-42a.

30. In addition to the correctness of the district court's determination, Respondents had argued before the Second Circuit that section 504 claims for equitable relief (as distinguished from monetary damages) do not even require a showing of intentional discrimination (including bad faith or gross misjudgment). The Second Circuit, however, never addressed this argument and ruled instead that the district court had applied the correct standard. Petition, Appendix "A," pp. 14a-16a. Therefore, there is **no** "issue of whether or not the 'bad faith/gross misjudgment' standard applies" as asserted by Petitioner. Petition, p. 19.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — COMPLAINT FILED JUNE 14, 2000 (STAMPED JUNE 13, 2000)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

COMPLAINT – CLASS ACTION

00-CV-513S

JURY TRIAL REQUESTED

J.S. [hereinafter "John"], by his parent and natural guardian, N.S. individually and on behalf of all others similarly situated; S.H. and C.H. [hereinafter "Sally" and "Charles"], by their parent and natural guardian, J.H. individually and on behalf of all others similarly situated; C.Z. and K.Z. [hereinafter "Caroline" and "Ken"], by their parent and natural guardian. K.Z. individually and on behalf of all others Similarly situated; D.E., [hereinafter "Dennis"] by his parent and natural guardian, S.E., on behalf of all others similarly situated

Plaintiffs

vs.

ATTICA CENTRAL SCHOOLS

Defendant

Appendix

PRELIMINARY STATEMENT

1. This is a class action to remedy defendant's policies, procedures and practices including inaccessible facilities, which deny the provision of a free appropriate public education to educationally and otherwise disabled children who attend public school in the ATTICA CENTRAL SCHOOLS (hereinafter "district") and/or who are entitled to service from said school district.

Plaintiff children bring this action by their parents who are residents of the ATTICA CENTRAL SCHOOLS. The representative children are students attending public school in the ATTICA CENTRAL SCHOOLS or entitled to receive educational and other services from the Attica Central Schools. Said students and numerous similarly situated student (present and future) are educationally, physically or otherwise disabled, or suspected of being educationally or otherwise disabled. [References to "otherwise disabled" children herein (and hereafter) mean children who may not be "educationally" disabled but are "disabled" and, as with educationally disabled children, are entitled to services and procedural safeguards under Section 504 of the Rehabilitation Act of 1973.].

3. Defendant has failed to meet its statutory and regulatory obligations to plaintiffs and numerous similarly situated children attending Attica Central Schools or who are entitled to services from said school district.

4. Defendant has failed to provide facilities which are accessible to students with physical disabilities.

5. Defendant's procedures are also rife with defects; for example, defendant has not complied with the applicable statutes and regulations requiring that children with disabilities or those suspected of possessing one or more disabling conditions be timely and appropriately evaluated, upon receipt of legally mandated notices, and subsequently promptly placed in programs providing appropriate special education and related services, in the least restrictive environment, and/or appropriate accommodations where necessary.

6. The specific relief plaintiffs request is as follows:

(a) A judgement declaring that the policies, procedures, customs, patterns, and/or practices of the Attica Central Schools deprive them of their constitutional and/or statutory rights, are illegal and/or invalid, and are in contravention of the defendant's statutory and constitutional duty to assure that plaintiffs and similarly situated children receive a free appropriate public education;

(b) issue a preliminary and permanent injunction requiring defendant to (1) make its facilities, programs and services accessible to all students with disabilities; (2) timely and adequately evaluate and identify potentially disabled children; (3) implement appropriate education placements and/or services on their behalf; and (4) to provide all students with disabilities a free appropriate public education;

(c) issue a preliminary and permanent injunction requiring defendant to submit a plan to the Court designed to remedy each and every legal violation, said plan to be

monitored by the plaintiffs and the Court for assure compliance;

(d) issue a judgment awarding monetary and/or other appropriate compensatory relief to any plaintiff or individual class member who establishes their entitlement to same in this action;

(e) An order directing defendant to pay the costs and disbursements incurred by plaintiffs in commencing and maintaining this action, and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, 29 U.S.C. § 794a, 20 U.S.C. § 1415(e)(4) and/or this Court's general equity powers;

(f) Such other and further relief as to this Court may seem just and proper. [Initials and pseudonyms have been substituted for the names of the plaintiffs. A separate document entitled "Addendum to Complaint" sets forth the identity of the Plaintiffs and is filed with the request that it be placed under seal.]

JURISDICTION

7. Jurisdiction is conferred on this Court by 20 U.S.C. § 1415(e) and 29 U.S.C. § 794 which provide this Court with jurisdiction over any action brought pursuant to said section(s) without regard to the amount in controversy; 28 U.S.C. § 1343(3) and (4) which provides for original jurisdiction by this Court in actions arising under 42 U.S.C. § 1983, to address claims for violations of rights secured both under the United States Constitution and federal statutes guaranteeing equal rights, which statutes in this case are

20 U.S.C. § 1400, *et seq.*, and 29 U.S.C. § 794; and 28 U.S.C. § 1331, based on the federal questions raised herein. The declaratory relief is sought pursuant to 28 U.S.C. § 2201 and § 2202.

8. This complaint also sets forth causes of action arising under the laws of the State of New York, which are incorporated into the standards applicable under 20 U.S.C. § 1401, *et seq.*

9. Plaintiffs herein, and the class they seek to represent, have no adequate remedy at law and have suffered and will continue to suffer irreparable harm unless defendant, including its agents, representatives and/or employees, is restrained from continuing its unlawful practices.

CLASS ACTION ALLEGATIONS

10. The class consists of children between the ages of 3 to 21 residing in the ATTICA CENTRAL SCHOOLS, present and future, who are or should be classified as disabled per the definition in the Individuals with Disabilities Education Act (20 U.S.C. § 1400, *et seq.*) or the Rehabilitation Act of 1973 (29 U.S.C. § 706(8) and 29 U.S.C. § 794), but who are denied their rights pursuant to said statutes, either substantively or procedurally, due to inadequacies in the defendant school district.

11. The members of this class are so numerous as to make joinder impracticable.

12. There are questions of law and fact common to the members of this class, namely whether defendant is violating the substantive and procedural rights of the class members, which rights are guaranteed to individuals with disabilities by the Constitution and laws of the United States, including their constitutional, statutory and regulatory right to a free appropriate public education in the least restrictive environment, their right to reasonable accommodation and nondiscrimination by reason of their disability and their parents' due process procedural rights conferred under the Fourteenth Amendment, the Individuals with Disabilities Education Act [20 U.S.C. § 1400 *et seq.*], Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794(a)], the New York State Education Law and regulations and other statutes. Such violations include the failure of defendant to assure that the eligibility of plaintiffs and similarly situated children for appropriate services, including special educational classes, programs and/or services is promptly determined, and appropriate placement and/or services effectuated where same is warranted, and the failure to provide facilities, services and/or accommodations to students with physical disabilities and for the identification, evaluation and/or accommodation of otherwise disabled children.

13. The claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs will fairly and adequately protect the interests of this class, as their interests do not, in any way, conflict with the interests of the class sought to be represented. The individual claims are not such that they can easily be compromised to the detriment of the claims of the class as a whole. Moreover, counsel for the

named plaintiffs will vigorously pursue this action on behalf of the named plaintiffs and class plaintiffs.

14. The defendant has acted, and failed to act, on grounds generally applicable to all of the class members. Defendant's customs, policies, procedures, patterns and/or practices of which plaintiffs complain, have had, and are having, a similar impact upon the plaintiffs and the class they seek to represent. Correction of these violations will benefit all of the class members. The relief sought herein applies to the class as a whole and not merely to any particular individual or group of individuals.

PLAINTIFFS

15. J.S. [hereinafter "John"] was born April, 1985, resides in the Attica Central Schools and currently attends Attica Middle School in a 12:1:1 class (12 students, 1 special education teacher, and 1 classroom aide). Attica Middle School is the only public school building in the Attica Central Schools educating middle school students.

16. John is classified by the defendant district's Committee on Special Education ("CSE") as a child who is multiply disabled.

17. John is a student who is physically handicapped, mobility-impaired and is dependant upon a wheelchair for his movement, and is otherwise affected with respect to his physical functioning.

Appendix

18. John has a diagnosis of cerebral palsy with left hemiplegia. In addition, John is mentally retarded and has perceptual/visual motor deficits.

19. Defendant has failed to provide John adequate access to the Middle School building and his educational program within it as mandated by law. Included in such failure are the legal violations set forth in paragraphs 20-25 hereunder.

20. Defendant has failed to offer John access into and out of the Middle School building equivalent to that afforded to non-disabled children and requires John to enter and exit the building through a circuitous route via the Middle School shop class.

21. Defendant has failed to provide John adequate access to the Middle School computer room.

22. Defendant has failed to provide John adequate access to the Middle School nurse's office.

23. Defendant has failed to provide John adequate access to the Middle School weight room.

24. Defendant has failed to provide John adequate access to the Middle School home economics room.

25. Defendant has failed to provide John appropriate access to the swimming pool.

26. Defendant has failed to provide adequate and/or safe toilet access for John.

27. Defendant has failed to provide John with a free appropriate public education as mandated by law. Included in such failure are the legal violations set forth in paragraphs 28-32.

28. Defendant has failed to provide John an appropriate and adequate Individualized Education Program ("IEP") including:

a. failure to provide measurable goals and objectives on the IEP document.

b. failure to provide appropriate goals and objectives based on John's current levels of performance.

c. failure to provide adaptive physical education.

d. failure to provide mobility training and/or orientation/travel training.

e. failure to address John's visual/perception deficits within the IEP document.

29. Defendant has failed to provide John appropriate transition services.

30. Defendant has failed to provide John and his parents with adequate and/or appropriate progress reports as required by law.

31. Defendant has failed to evaluate John and provide assistive technology services.

32. Defendant has failed to provide John with an education in the least restrictive environment (LRE).

33. S.H. [hereinafter "Sally"] was born April, 1989, resides in the Attica Central Schools and currently attends Prospect Elementary School in a 12:1:1 class (12 students, 1 special education teacher, and 1 classroom aide).

34. Sally is classified by the defendant district's CSE as a child who is multiply disabled.

35. Sally is a student who is physically handicapped, mobility-impaired, dependant upon a wheelchair for her movement, and is otherwise affected with respect to her physical functioning.

36. Sally has a diagnosis of cerebral palsy with seizure disorder. In addition, Sally is mentally retarded, visually impaired, speech impaired and is for the most part non-verbal. Sally utilizes "Total Communication" sign language and is technologically assisted with equipment called a Dynavox.

37. Defendant has failed to provide Sally adequate access to school and her educational program as mandated by law. Included in such failure are the legal violations set forth in paragraphs 38-43 hereunder.

38. Defendant has failed to offer Sally access into and out of the Prospect Elementary School building equivalent to that afforded to non-disabled children and requires Sally to enter and exit the building through a doorway that, although equipped with a ramp, cannot be independently

opened by Sally and must be propped open by another individual in order for her to enter and exit through the doorway.

39. Sally is confined to the first floor of the building and is denied appropriate access to the other three floors, consisting of the basement, second floor and third floor, and the programs and services provided thereat.

40. Defendant has failed to provide Sally appropriate access to the cafeteria. As a result, Sally and her entire class eat in their academic classroom, while all other children go to the cafeteria on the basement level.

41. Defendant has failed to provide Sally appropriate access to the music room.

42. Defendant has failed to provide Sally appropriate access to the computer lab.

43. Defendant has failed to provide Sally appropriate access to the school playground.

44. Defendant has failed to provide Sally with a free appropriate public education as mandated by law. Included in such failure are the legal violations set forth in paragraphs 45-48.

45. Defendant- has failed to provide Sally adequate and/or appropriate related services including physical therapy and occupational therapy.

46. Defendant has failed to provide Sally's education in the Least Restrictive Environment (LRE).

47. Defendant has failed to adequately consider what constitutes the LRE for Sally.

48. Defendant has failed to have timely re-evaluations completed for Sally.

49. C.H. [hereinafter "Charles"] was born August, 1982, resides in the Attica Central Schools and currently attends Attica Senior High School in regular education classrooms.

50. Charles is classified by the defendant district's CSE as a child who is learning disabled.

51. Charles is a student who is receiving resource room services as well as testing modifications.

52. Defendant has failed to provide Charles with a free appropriate public education as mandated by law. Included in such failures are the legal violations set forth in paragraphs 53-56.

53. Defendant has failed to provide Charles an appropriate and adequate IEP by failing to develop for Charles an adequate transition plan as required by law.

54. Defendant has failed to appropriately implement testing modifications required by Charles' IEP.

55. Defendant has failed to inform staff involved with Charles and/or in-service the staff on what their responsibilities are involving implementation of Charle's IEP.

56. Defendant has failed to provide Charles with such special education and/or related services that would enable him to benefit from his educational program.

57. C.Z. [hereinafter "Caroline"] was born July 1993, resides in the Attica Central Schools and currently attends Prospect Elementary School in a pre-first grade program for at-risk students. Caroline receives speech services from the District, but is not classified under the IDEA.

58. Defendant has failed to identify, evaluate and appropriately classify Caroline as a student with learning disabilities in violation of their child-find obligation under federal law.

59. Defendant has denied Caroline's due process rights by failing to provide her parent a copy of relevant testing and/or evaluations) that were used as a basis to determine that Caroline is not eligible to be classified as a student with learning disabilities. Rather, Caroline's parent was told that Caroline was not eligible for special education because she scored too high on tests.

60. K.Z. [hereinafter "Ken"] was born November 1990, resides in the Attica Central Schools and currently attends Sheldon Elementary School as a fifth grade student in a regular education setting.

61. During the 1998/1999 school year, Ken was declassified by the CSE from his classification as speech impaired.

STATUTORY AND REGULATORY FRAMEWORK

71. Congress has enacted two statutes that impose obligations upon school districts to address the needs of students with disabilities. One statute is Section 504 of the Rehabilitation Act of 1973 which is codified at 29 U.S.C. § 794.

72. Pursuant to Section 504, each disabled student in the District is protected from discrimination based on his or her disability and accordingly must be provided access to all the District's programs, including all programs provided to non-disabled students. 29 U.S.C. § 794, 34 C.F.R. §§ 104.21, 104.22 and 104.23.

73. Furthermore, pursuant to Section 504, each disabled student must be provided reasonable accommodation designed to respond to that student's particular disability.

74. Each disabled student in the ATTICA CENTRAL SCHOOLS also must receive a free appropriate public education including special education and supportive aids and services to meet the needs of the disabled student. 20 U.S.C. § 794, 34 C.F.R. § 104.31 *et seq.*

75. The second statute, the Individuals with Disabilities Education Act [IDEA], requires school districts to provide a free appropriate public education, in the least restrictive

environment, including special education and related services to students who are educationally disabled. *See,* 20 U.S.C. § 1400 *et seq.* 34 C.F.R. § 300 *et seq.*, N.Y.S. Education Law § 4401 *et seq.* and 8 NYCRR §§ 200 and 201 *et seq.*

76. The IDEA establishes a system of procedural and substantive requirements to which school districts must adhere to ensure that each child with a disability receives a free appropriate public education. 20 U.S.C. § 1401, *et seq.*

62. Defendant has failed to provide Ken with declassification support services as required by law.

63. D.E. [hereinafter "Dennis"] was born June, 1984, resides in the Attica Central Schools and is currently enrolled at Attica Senior High School.

64. Dennis has a medical condition that presents with symptoms including "Irritable Bowel Syndrome" (IBS) and by virtue of that condition is a person with a disability as defined under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 706(8) and 34 C.F.R. § 104.30).

65. Defendant has failed to hold properly constituted multidisciplinary team meetings for Dennis.

66. Defendant has failed to implement adequate and/or appropriate policies, practices and/or procedures for Section 504 with regard to Dennis.

67. A hearing request had been made to address issues unique to Dennis. Although such hearing was resolved, none of the systemic issues raised in the instant law suit were, or could have been, addressed.

DEFENDANT

68. The ATTICA CENTRAL SCHOOLS is a "local educational" agency within the meaning of 20 U.S.C. § 1401(8).

69. Said school district receives substantial state and federal funds earmarked for the provision of special educational programs and services for educationally disabled children.

70. Said school district is obligated to comply with all federal and state laws and regulations respecting the education and accommodation of students with disabilities.

FACTUAL ALLEGATIONS

77. As alleged hereinbefore, defendant has failed to fulfill its legal obligations to assure that plaintiffs are promptly and properly evaluated, identified and/or provided the appropriate programs and services to which they are entitled.

78. Upon information and belief, defendant has failed to provide services, accommodations and/or facilities which are legally accessible to students with physical disabilities.

79. Upon information and belief, defendant has failed to conduct or perform legally required activities or responsibilities and/or to do so in a timely manner, including determinations of child-find, eligibility, identification, referral, evaluations, reevaluations, IEP development, accommodation plans and/or placement in programs providing appropriate special education and related services for educationally and/or otherwise disabled children; and has failed to adopt and/or implement policies, practices and/or procedures to ensure that such legally required activities or responsibilities are performed and/or completed in a proper and timely manner.

80. Upon information and belief, the defendant has failed to perform complete and/or timely evaluations and re-evaluations of disabled children and/or children suspected of being educationally and/or otherwise disabled.

81. Upon information and belief, the defendant has failed to prepare and/or implement adequate Individual Education Programs (IEPs).

82. Upon information and belief, defendant has failed to adequately conduct and/or consider testing, assessments and evaluations in conducting or performing legally required activities or responsibilities, including determinations of eligibility, identification, referral, evaluations, re-evaluations, IEP development, accommodation plans and/or placement in programs providing appropriate special education and related services for educationally and/or otherwise disabled children.

83. Upon information and belief, defendant has failed to identify and address individual needs of students.

84. Upon information and belief, defendant has failed to notify parents of defendant's legal obligations related to otherwise disabled children.

85. Upon information and belief; defendant has failed to provide parents with required procedural safeguards regarding identification, evaluation and accommodation of otherwise disabled children.

86. Upon information and belief, defendant has failed to conduct or perform legally required activities or responsibilities in a timely manner, including transition plans, transitional support services, assistive technology services and declassification services for children with disabilities.

87. Upon information and belief, defendant has failed to prepare and/or implement legally sufficient transition plans for students with disabilities and/or has failed to adhere to related procedural requirements.

88. Upon information and belief, defendant has failed to implement legally sufficient life skills training, assistive technology services, transitional support services and declassification services for students with disabilities.

89. Upon information and belief, defendant has failed to comply with legal requirements regarding parental participation in procedures and processes related to the identification, evaluation, re-evaluation and provision of a

free appropriate public education for educationally or otherwise disabled students, and/or has failed to document same.

90. Upon information and belief, defendant has failed to notify and/or timely notify parents of defendant's legal obligations related to educationally disabled children, including notice describing actions proposed or refused, explanations of such actions, options considered and/or rejected, the basis for and/or factors related to such actions and a statement of the parents procedural safeguards and/or the means by which such description of procedural safeguards can be obtained.

91. Upon information and belief, the defendant has failed to adopt and/or implement adequate and/or appropriate practices and/or procedures for classification, evaluation and/or accommodation of otherwise disabled children as required by Federal Law (29 U.S.C. § 794, [Section 504 of the Rehabilitation Act of 1973]).

92. Upon information and belief, the defendant has failed to comply with the procedural requirements of Federal and State law relative to the education of children with disabilities (20 U.S.C. § 1400 *et seq.*; 8 NYCRR, Parts 200 and 201).

93. Upon information and belief, the defendant has failed to adopt and/or implement policies, practices and/or procedures to assure that educationally disabled children's Individual Education Programs (IEPs) are adequately and/or properly formulated.

94. Upon information and belief, defendant has failed to provide a continuum of services, programs and/or placement options as required by law.

95. Upon information and belief, defendant has failed to consider and/or implement placements and services in the least restrictive environment, as required by law.

96. Upon information and belief, defendant has failed to provide notice, as required by law, to parents and/or children who are educationally disabled, of meetings, related to the provision of a free appropriate public education and/or reasonable accommodations to be afforded to such children, including notice of the participants and agenda at such meetings.

97. Upon information and belief, defendant has failed to properly inform staff and personnel who are responsible for the implementation of IEPs.

98. Upon information and belief, defendant has failed to in-service staff and personnel on their responsibilities to implement IEPs.

99. Upon information and belief, defendant has failed to prepare and/or implement Individual Education Programs (IEPs) with legally required testing modifications.

100. Upon information and belief, defendant has failed to provide parents with legally required progress reports.

101. Upon information and belief, defendant has failed to prepare and/or implement Individual Education Programs (IEPs) which provide special education and/or related services, including adaptive physical education, speech and mobility training and which address all identified needs.

102. Upon information and belief, defendant has failed to prepare and/or implement Individual Education Programs (IEPs) with legally required and adequate goals and objectives.

103. Upon information and belief, defendant has failed to provide appropriate training to staff (including the training of aides).

104. Upon information and belief, defendant has failed to provide parents with copies of evaluations.

FIRST LEGAL CLAIM

105. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 104, above.

106. As set forth above, defendant has failed to provide plaintiffs and similarly situated children with a free appropriate public education, both procedurally and substantively, as mandated under the Individuals with Disabilities Education Act (20 U.S.C. § 1400, *et seq.*, 34 C.F.R. § 300, *et seq.*).

SECOND LEGAL CLAIM

107. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 106, above.

108. By virtue of defendant's aforedescribed treatment of plaintiffs and failure to afford them accommodations, it has violated plaintiffs' rights under 29 U.S.C. § 794, and related regulations by discriminating against them and depriving them of appropriate accessibility to essential services and programming, by virtue of their status as individuals with disabilities.

THIRD LEGAL CLAIM

109. Plaintiffs, repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 108, above.

110. As set forth above, defendant has failed to provide plaintiffs and similarly situated children with a free appropriate public education and/or reasonable accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, 34 C.F.R. §104, *et seq.*).

FOURTH LEGAL CLAIM

111. Plaintiffs, repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 110, above.

112. New York State's Compulsory Attendance Law, New York Education Law § 3208 and Article 89, § 4401 *et seq.*, governing the provision of education to children with disabilities, as well as § 1 of Article 11 of New York State's constitution, impose an obligation upon the defendant to ensure that each school-age child with a disability in the school district receives an appropriate education at public expense.

113. In addition, New York State's Education Department, which is required by 20 U.S.C. § 4401 *et seq.*, to assure that local educational agencies comply with the substantive and procedural requirements of said statute, has promulgated State Regulations in that regard, which are codified at 8 NYCRR Part 200 and Part 201.

114. As set forth above, defendant has violated the mandates of the New York State Education Department including Parts 200 and 201 of the Commissioner of Education's regulations, by their aforementioned actions.

SIXTH LEGAL CLAIM

115. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 114, above.

116. The Fourteenth Amendment to the United States Constitution guarantees plaintiffs' rights under that Amendment's equal protection and/or due process clauses. Defendant's actions and failures to act, hereinbefore alleged, have violated and continue to violate plaintiffs' constitutional rights.

117. Inasmuch as defendant is acting under color of state law, 42 U.S.C. § 1983 confers a remedy to plaintiffs to enforce their rights under the equal protection and/or due process clause and the other above-cited federal statutes guaranteeing equal rights.

118. By virtue of defendant's above-described actions against plaintiffs, it is in violation of plaintiffs' constitutional and statutory rights, and said violation is actionable under 42 U.S.C. § 1983.

WHEREFORE, plaintiffs respectfully request that this Court assume and retain jurisdiction over this action and issue the following relief

(a) issue a judgment declaring that the defendant's policies, procedures, customs, patterns and/or practices deprive them of their constitutional and statutory rights, are illegal and/or invalid, and in contravention of defendant's

statutory and constitutional duty to assure that plaintiffs and similarly situated children receive a free appropriate public education;

(b) issue a preliminary and permanent injunction requiring defendant to (1) make its facilities, programs and services accessible to all students with disabilities; (2) timely and adequately evaluate and identify potentially disabled children; (3) implement appropriate education placements and/or services on their behalf; and (4) to provide all students with disabilities a free appropriate public education;

(c) issue a preliminary and permanent injunction requiring defendant to submit a plan to the Court designed to remedy each and every legal violation, said plan to be monitored by the plaintiffs and the Court to assure compliance;

(d) issue a judgment awarding monetary and/or other appropriate compensatory relief to any plaintiff or individual class member who establishes their entitlement to same in this action;

(e) issue an order directing defendant to pay the costs and disbursements incurred by plaintiffs in commencing and maintaining this action, and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, 29 U.S.C. § 794a, 20 U.S.C. § 1415(e)(4) and/or this Court's general equity powers; and

(f) such other and further relief as to this court may seem just and proper.

DATED: June 14, 2000
Buffalo, New York

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